Testimony by Elouise Cobell
IIM Trust Beneficiary
Before the House Committee on Resources
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Thank you, Mr. Chairman, for this opportunity to address the Committee on the issue of reform of the Individual Indian Monies (IIM) trust.

The history of mismanagement of the IIM trust is long and tortured, but it boils down to three "must-do's":

Ø **The IIM trust system must be fixed**. The Secretary of the Interior has ignored the will of Congress and misled Congress for decades. Since December 1996, the Interior Secretary has ignored orders entered by Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia. Nothing has changed. Since the Interior Secretary continues to breach the trust duties owed by the United States government to individual Indian trust beneficiaries and Congress clearly is unable to compel an obdurate member of the President's Cabinet to obey the law and discharge the trust duties conferred on her by Congress, it is time for Judge Lamberth, with the support of Congress, to place the IIM trust in receivership.

Ø **The IIM beneficiaries must be provided an accounting**. Reportedly, at least $500 million a year in trust revenues is generated from individual Indian-owned lands. Where is the money? The Interior Secretary has demonstrated through the fraud she has perpetrated on the United States District Court and the United States Court of Appeals that she no longer should be trusted to manage or account for Individual Indian Trust funds.

Ø **Restitution must be made**. True trust reform will require a re-statement of the Individual Indian Trust. More than $100 billion in trust deposits, interest and accruals remains unaccounted for. We hope that this year, Judge Lamberth will set a trial date to determine the full amount due to the individual Indian trust beneficiaries.

Mr. Chairman, the IIM trust is supposed to be the mechanism by which revenues from Indian-owned lands throughout the Western states are collected and distributed to approximately 500,000 current individual Indian trust beneficiaries. This trust is a vital lifeline for Native Americans, many of whom are among the poorest people in this country. Where I live, in Glacier County, Montana, the home of the Blackfeet Nation and one of the 25 poorest counties in the United States, I can tell you that many people depend on these payments for the bare necessities of life. These trust checks are not a luxury. Trust funds are not a handout or an entitlement program. It is very important to keep in mind that this is *our* money - revenue from leases for oil and gas drilling, grazing, logging and mineral extraction on Indian lands. This Individual Indian Trust was devised by the United States government and imposed on Indian peoples more than a century ago. As trustee, the United States and each branch of the federal government has the highest legal and fiduciary responsibility to manage the Individual Indian Trust in a scrupulously professional manner, exclusively for the benefit of Individual Indian Trust beneficiaries.

Unfortunately - as you and many of the members of this Committee are well aware, Mr. Chairman - this has been, and remains, a severely broken trust. The mismanagement of the Individual Indian Trust by the United States government for more than 120 years is a national disgrace. The refusal of the Executive Branch to fix it is appalling. The failure of Congress to act decisively to hold the Interior Secretary accountable for her malfeasance is disturbing and indefensible. Since we initiated class action litigation in 1996 to enforce the

trust obligations owed by the United States to individual Indian trust beneficiaries, I have said many times to our legal team that the government's bad faith and misconduct simply cannot get any worse. And each time I've been wrong. It gets worse and worse and worse - in spite of humiliating courtroom defeats, in spite of scathing reports by court-appointed watchdogs and the government's own consultants and experts, in spite of shameful news coverage and editorials in the media, and in spite of repeated warnings and admonitions from the Congress. The Interior and Treasury Secretaries' malfeasance strains the limits of our language. The courts and Congress have used some of the strongest rhetoric I have ever seen to describe the injustice being done to the individual Indian trust beneficiaries, and still the Secretary of the Interior, the Secretary of the Treasury and the Attorney General fight on against us and defend the legally and morally indefensible. Why? Where has Congress been while this mugging has gone on for nearly six years a few blocks away from this hearing room? Where is the outrage from this body? Why has Congress turned its back on Indian people again?

Mr. Chairman, I would like to make this clear at the outset to the members of the Committee: Hundreds of thousands of American citizens - the individual Indian trust beneficiaries - have won decisively at every stage of this litigation. More than two years ago - in December 1999 - we won a landmark decision at the U.S. District Court. The Justice Department appealed that decision, and we won unanimously at the appellate level a year ago -- in February 2001. Two members of President Clinton's Cabinet - Messrs. Rubin and Babbitt -- were held in contempt of court in February 1999 for violating court orders and covering up their violations, and the taxpayers paid their $630,000 fine. Now we are in the middle of a contempt trial for Secretary Norton and Assistant Secretary for Indian Affairs Neal McCaleb for violating court orders and for perpetrating a fraud on the court, and I have no doubt that they, too, will be held in contempt. Tens of millions of dollars have been appropriated by this Congress to defend the fraud, deceit and malfeasance of the Interior Secretary and the Treasury Secretary.

Judge Lamberth already has ruled that the Secretary's abject failure to provide even minimal computer security protection for individual Indian trust data and trust funds is contemptible on its face. She also faces charges of failing to begin to provide an historical accounting to the individual Indian trust beneficiaries (more than seven years after Congress ordered them to do so and more than two years after Judge Lamberth ordered them to do so), and submitting false report after false report to the court. Despite being ordered by Congress and the courts to reform the trust and provide the historical accounting, testimony in the contempt trial going on now shows that the Secretary of the Interior has done nothing - *nothing* - to comply. The Administration's mindless battle to prolong this case - in the face of certain defeat - is an indefensible waste of judicial resources and an insult to both Native Americans, taxpayers and anyone with integrity.

Mr. Chairman, the individual Indian trust beneficiaries have asked Judge Lamberth to strip control of the trust away from the Secretary of the Interior and place it temporarily in the hands of a receiver. If Judge Lamberth finds Secretary Norton in contempt, as we hope he will, it will clear the way for the judge to do just that. The judge has said in court recently that he is proceeding carefully in this contempt trial - giving the government all the rope it wants - because no court has put an agency of the Executive Branch into receivership the history of this nation. But that is exactly where we are headed. And it will be a fine day when it happens, too. I would like to return to this subject in a moment to explain why we have asked for receivership, why a receiver is immensely preferable to Secretary Norton's ill-advised, last-minute reorganization plan for the BIA, and why the support of Congress for receivership is important.

If the Secretary is found in contempt and the Individual Indian Trust is placed, at last, in the competent hands of a receiver, I hope we can move to trial on the final issue - a restatement or correction of the Individual Indian Trust balances - before the end of the year (subject, of course, to the court's discretion and

schedule). In 1999, Judge Lamberth and the U.S. Court of Appeals ordered the Secretaries of Interior and Treasury to provide individual Indian trust beneficiaries with an historical accounting of "all" trust revenues, withdrawals and accruals. However, Mr. Chairman, Interior has done nothing. A senior trust official testified last month that Interior "is not yet at the starting gate" on an accounting. In fact, he testified that Interior officials are still debating internally what the term "historical accounting" means. Secretary Norton's most recent Quarterly Report to the court acknowledges that her department's trust reform master plan has been shelved. A $3 million consultant's report to Interior advises starting over. Even if Interior and Treasury were acting in good faith, they are unable to provide an accounting because they have destroyed, and continue to destroy, the individual Indian trust records (making the Enron debacle seem to be trivial in comparison). They also have spent $36 million "so far" on a new trust accounting computer system that does not work and will have to be scrapped.

The bottom line is that the Bush Administration is under court order to account for more than $100 billion in Individual Indian Trust monies and has utterly refused to do so. Judge Lamberth will decide in the upcoming trial how much of those funds must be restored to correct the stated IIM trust balances. That figure is yet to be determined finally, but if we go to trial it likely will be much more than $100 billion. Despite this impending financial train wreck and continuing legal humiliation - despite the oaths that the government's lawyers take as officers of the court - the Interior Secretary, the Treasury Secretary and the Attorney General march on, too arrogant to enter into good-faith settlement discussions that could cut this fiasco short, spare the court's time and energy and somewhat soften the Executive Branch's dishonor.

Mr. Chairman, I believe it would be helpful at this point to summarize very briefly the history of the Individual Indian Trust and how the Executive Branch has arrived at this state of disgrace while Congress has turned its back on Indian people.

The IIM trust derives from the 1887 General Allotment Act (the "Dawes Act"), which, as Judge Lamberth has noted, was "driven by a greed for the land holdings of the tribes." [Judge Lamberth's Dec. 21, 1999 decision in the *Cobell* case contains a concise history of the trust. It is posted on the *Cobell* plaintiffs' web site at www.indiantrust.com, under Court Rulings.] Under Dawes, tribes were paid for their land and each head of household was allotted property, usually 40-, 80- or 160-acre parcels. The land left over was opened to "non-Indian" settlement. The allotted lands were held in trust by the United States for the individual Indians. For more than 120 years, the Interior Department, and specifically the Bureau of Indian Affairs, has overseen the leasing of these allotted lands on behalf of the original allottees and their heirs. Revenues from these leases have been collected by Interior and supposedly held, invested and disbursed to the trust beneficiaries by the Treasury Department., under Court Rulings.] Under Dawes, tribes were paid for their land and each head of household was allotted property, usually 40-, 80- or 160-acre parcels. The land left over was opened to "non-Indian" settlement. The allotted lands were held in trust by the United States for the individual Indians. For more than 120 years, the Interior Department, and specifically the Bureau of Indian Affairs, has overseen the leasing of these allotted lands on behalf of the original allottees and their heirs. Revenues from these leases have been collected by Interior and supposedly held, invested and disbursed to the trust beneficiaries by the Treasury Department.

From the beginning, this system has fallen prey to abuse, corruption, neglect and incompetence. As the U.S. Court of Appeals for the District of Columbia Circuit said in its Feb. 23, 2001 decision upholding Judge Lamberth, "The trusts at issue here were created over one hundred years ago…and have been mismanaged nearly as long." Incredibly, since 1887 the management of the IIM trust has not grown steadily better, but steadily worse. It is worse today than it was in 1996, when we filed our lawsuit. Just to quote one brief passage from Judge Lamberth's 136-page opinion:

"It would be difficult to find a more historically mismanaged federal program than the [IIM] trust….The court knows of no other program in the American government in which federal officials are allowed to write checks - some of which are known to be written in erroneous amounts - from unreconciled accounts - some of which are known to have incorrect balances. Such behavior certainly would not be tolerated from private sector trustees. It is fiscal and governmental irresponsibility in its purest form."

The glaring mismanagement of the IIM trust was exposed (not for the first time, or the last) by the House Committee on Government Operations, in its landmark 1992 report entitled "Misplaced Trust: The Bureau of Indian Affairs' Mismanagement of the Indian Trust Fund," which was spearheaded by the late Rep. Mike Synar (D-OK). Citing the trust's "appalling mismanagement," Mr. Synar likened the IIM trust to "a bank that doesn't know how much money it has."

The Synar Report led to passage by the Congress in 1994 of the Indian Trust Reform Act. In an attempt to end Interior's chronic incompetence in running the IIM trust, the act established a Special Trustee for American Indians to oversee reform. A Level 2 position filled by a presidential appointee who is subject to Senate confirmation, the Office of Special Trustee was expected to provide the leadership and accountability that trust reform had been lacking. Sadly, that has not been the case.

On June 10, 1996 - after years of runarounds from Interior and the BIA, and convinced that they would have to be forced to clean up the IIM trust - we filed our class action lawsuit against the Secretaries of the Interior and Treasury. Judge Lamberth split our complaint into two issues - reform of the trust, and a re-statement of the accounts. On Nov. 27, 1996, the judge also ordered Interior and Treasury to preserve all existing IIM trust documents and to produce relevant documents and records to the plaintiffs. In fact, destruction of records and documents, including e-mails written by government lawyers in this case, has continued throughout the life of the litigation. Secretaries Babbitt and Rubin were held in contempt by Judge Lamberth in February 1999 for ignoring the document order, and the judge subsequently appointed a Special Master, Alan Balaran, to oversee the government's compliance. Unknown to all of us at the time, Treasury had destroyed an additional 162 boxes of trust records during the contempt trial. Treasury and Justice Department attorneys waited 13 weeks to inform the court.

After a nine-week trial on the first issue - how to fix the system - Judge Lamberth ruled on Dec. 21, 1999 that the United States must provide an historical accounting for "all" IIM funds. He ordered Interior and Treasury to reform the trust, and required quarterly reports from Interior on its progress.

Testimony in the Norton-McCaleb contempt trial has shown that for more than a year after Lamberth's decision, officials and lawyers at Interior and Justice did nothing about an accounting and little about trust reform. They believed that Lamberth had exceeded his authority and hoped he would be overturned by the appeals court. What actions Interior and Justice did take were driven by their litigation strategy and in support of their appeal, with no regard for the IIM trust beneficiaries. A senior trust official, Principal Deputy Special Trustee Thomas Thompson, testified that today - more than two years after Lamberth's decision - not a single IIM account has been certified as accurate. ("It really makes you wonder why I'm sitting here, doesn't it?" said Judge Lamberth.)

On Feb. 23, 2001, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit unanimously upheld Judge Lamberth. The same day, a senior Interior Department official sent a memo to the Special Trustee exposing the department's trust reform efforts as a sham. The department's trust reform plan, he wrote, was based on "rosy projections" and "wishful thinking." "Posturing for the court….seemed to be the primary

influence on objectives and guidelines." Eventual disclosure of the memo by the Justice Department led Judge Lamberth to appoint a Court Monitor to assess Interior's true progress on trust reform and the veracity of its quarterly reports to the court.

Four scathing reports by the Court Monitor, Joseph S. Kieffer III, since his appointment in May 2001 form the basis of four contempt charges against Norton and McCaleb. (Court-ordered trust reform, said Kieffer, "is a chimera. The trust reform ship has been scuttled… A cynical observer would go so far as to say it never left dry-dock; rotting there.") A separate report by Special Master Balaran on the utter lack of computer security for IIM accounting data led to a fifth count of contempt. (It is Balaran's report that Judge Lamberth found to be a prima facie case for contempt.) This past Friday, Mr. Kieffer issued two more reports. They only add to the searing indictment of Secretary Norton, Secretary O'Neill and Attorney General Ashcroft in this matter. The Kieffer reports document a shocking pattern of misleading statements and outright lies to the court in the quarterly reports submitted by the Interior Secretary. Starting with the 3rd Quarterly Report in late summer of 2000, the Special Trustee, Thomas N. Slonaker, began to include his own independent comments, suspecting that project managers in the field were painting a false picture of their trust reform progress. By the 7th Quarterly Report last fall, Slonaker refused to verify the accuracy of the contents. Pressured by Interior lawyers to verify the report, other senior trust officials also refused because, they said, "certifying the 7th Quarterly Report would border on the foolhardy."

"No senior DOI official would touch that report with a 10-foot pole," said Kieffer, who found that Norton had submitted to the judge "an untruthful, inaccurate and incomplete" report. Judge Lamberth has since ordered Secretary Norton to sign all future quarterly reports personally. (In her 8th Quarterly Report, submitted last month, Norton says her signature "reflects my belief that my personal observations in the Report are true…")

Balaran's report on the lack of computer security is equally disturbing. With court permission, he hired experts who easily hacked into the IIM trust accounting system and created a phony account without being detected. Balaran has recommended to Judge Lamberth that the system be placed in receivership.

With her credibility in tatters and faced with the virtual certainty of contempt, Secretary Norton and her inner circle of senior officials have now proposed a drastic reorganization of trust responsibilities into a new Bureau of Indian Trust Asset Management. Because she has done this so late in the day and so suddenly - and without proper consultation with tribes, as required by law - her actions appear to be a desperate attempt to stave off contempt. The proposal has met with very strong opposition throughout Indian Country. Among its flaws, it would merge the tribal trust with the IIM trust under one entity, ignoring the trusts' two distinctly different functions, constituencies and histories. This plan will undermine - not protect - tribal sovereignty. It will violate the IIM account holders' own direct relationship with the federal government, established by law.

Ironically, Norton already has hired former Assistant Secretary for Indian Affairs Ross Swimmer to head this effort. She ignores the fact that Swimmer was sharply criticized in the Synar Report for management failures involving the IIM trust. She ignores the fact that Swimmer - at best - has a "checkered" personal financial history. His BIA management included leading a misguided attempt to privatize the IIM trust, spending $1 million on the project and getting nothing in return. "BIA eventually paid Security Pacific [the bank intended to take over the trust] $934,512, but according to the Assistant Secretary for Indian Affairs [Swimmer], did not obtain any benefits for the government….Far from 'excusing' the waste of almost $1 million in tax dollars, the Bureau's inept handling of the Security Pacific contract simply underscores the

reasons why it should not have been awarded in the first place," the report concluded.

Swimmer's hiring points up the most critical defect in the Secretary's proposal: It would leave the trust in Interior's control, at the mercy of the same inept managers. It is crystal clear from the long record of IIM trust mismanagement that it is time - past time - to remove the trust from Interior's grasp and place it temporarily in the hands of a receiver. The IIM beneficiaries deeply deserve a trust run by competent and experienced professionals, with commercial standards of accountability. Fixing the system is a crucial component of trust reform, and becomes even more so as we draw closer to Trial Two and the issue of re-stating the accounts. The two must go hand-in-hand.

Mr. Chairman, it is our hope that this Committee and the Congress will terminate all appropriations needed by the Interior Secretary, the Treasury Secretary and the Attorney General to continue their bad faith legal defense. Instead, we ask that you support the individual Indian trust beneficiaries' request for appointment of a receiver under the supervision of the judiciary as the only rational solution for the government to fix the Individual Indian Trust. Congress has appropriated more than $614 million for trust reform since 1996, and it has gotten virtually nothing in return - no accounting of Individual Indian Trust monies, no rehabilitation of the woeful system, no improvement in information technology. The court and the Congress have not even gotten the truth from the Interior Secretary, in part because she and her advisors do not know the truth and lack the qualifications and skill to learn the truth before they inflict more irreparable harm on individual Indian trust beneficiaries.

The Court Monitor's 6th Report to Judge Lamberth, which was made public last week, captures the lack of accountability and the arrogance that the individual Indian trust beneficiaries have experienced for decades from their government. Kieffer said:

The Secretary's candor in the Eighth Quarterly Report is refreshing. But the exacerbation of the "ordinary human inclination" to report only good news and ignore the bad was in the context of carrying out the highest fiduciary trust duties imaginable owed to the American Indians by the United States government. Compare this comment on the human fallibility of DOI and BIA officials with the realization that their reports were at the direction of and for the consideration of a United States District Court. A District Court that had previously held two Cabinet-level Secretaries and one Assistant Secretary in civil contempt for their and their subordinates' failure to overcome this ordinary human inclination to lie or dissemble when bad news as well as good was required by Court order to be reported by Defendants and their attorneys.

The Secretary's admission that activities had been designated completed when "little material progress is evident" is the most telling comment in the entire Eighth Quarterly Report. The Secretary, in attempting to prepare an accurate and complete quarterly report, has now found what the Court Monitor has reported in every single Report to this Court - the reports have been untruthful. The only problem is that nowhere can be found any indication that those who have committed or permitted these actions constituting contempt on the Court have been or will be held accountable. No indication whatsoever that they will be forbidden to continue in supervisory or project manager roles in the proposed BITAM and their conduct reviewed for disciplinary action and possible dismissal from their present positions. Who within DOI will hold these officials accountable for the past and present harm caused to the IIM account holders by their unprofessional conduct and misleading reports that covered up and hid the most serious of their failures? Apparently no one, because they remain in leadership positions involved with trust operations and related management and legal activities or have moved on to equivalent senior positions within DOI.

Where also can be found the expressions of apology and remorse by these same executives, managers and

attorneys that should now be substituted in the Eighth Quarterly Report for the repeated arrogant stances taken by the Defendants in the past seven false, inaccurate, and incomplete quarterly reports and their legal defenses of them before this Court?

These Indian Trust duties were no ordinary responsibilities or obligations of the United States; no APA administrative functions; not a "no harm, no foul" badminton game or walk in the park. The Secretary's understanding of these human failings of her subordinates may fall on deaf hears in Indian Country where the effect of these unreported failures has been and is so severely felt.

Reference need only be made to the present IT Security failure and Court-ordered shutdown. The resultant loss of the income stream to the most needy IIM account holders and Indian Tribes is a perfect example of the result of these ordinary human inclinations. Who will be held accountable for the TAAMS' failures or the failure to even address the IT Security lapses? Failures made aware to the Defendants months if not years ago by their own paid consultants, the GAO, and the Special Master.

What also will be the human inclination of Senators and Representatives on oversight committees regarding the appropriation of more monies for the Defendants to try to correct this morass? And who will end up being harmed if the Congress might - understandably - be reluctant to trust the Defendants to perform any better in the future, further delaying trust reform until a new agency can be created and staffed? None other than those same IIM account holders who have suffered so much for so many years at the hands and tender mercies of the Defendants.

Candor about your subordinates' human failings is one thing, demonstrating how you will hold people accountable for their past and future nonfeasance, misfeasance or malfeasance is quite another. This Court and Congress should require no less.

Now is the time for the Congress to send a clear signal that waste, fraud and malfeasance are unacceptable and that it wants honorable, fit, experienced managers in charge of fixing this badly broken mechanism. This is a chance for all of us to stand up for financial and professional accountability. I believe strongly that further appropriations for trust reform should be fenced in, to be used by a receiver and not the failed programs of the past or defense of the indefensible litigation. The Individual Indian Trust should be put in the intensive care of a receiver supervised by Judge Lamberth until it has been rehabilitated fully and restored to health.

After the Court-appointed receiver rehabilitates the Individual Indian Trust, it is crucial that the Individual Indian Trust remain well-managed in conformity with the duties of a true fiduciary and, therefore, is, above all, free of politics and bureaucratic fumbling. The Individual Indian Trust already is one of the very few permanently and indefinitely appropriated funds of the United States, similar to the FDIC, the Federal Reserve Board and the Comptroller of the Currency. Therefore, like the Office of the Comptroller of the Currency vis-à-vis the Treasury Department, the Individual Indian Trust - after rehabilitation by crisis managers appointed by the Court - could be recast as an independent bureau within the Interior Department. Independence within Treasury is reinforced because the Comptroller is appointed by the President for a fixed five-year term, and the Comptroller reports to the President, not the Treasury Secretary. And there is little doubt that the Comptroller of the Currency model has worked well under difficult circumstances since 1863. Instead of underwriting nonexistent trust reform, a skilled Trustee for the Individual Indian Trust - protected from politics and funded with permanent and indefinite appropriations - could hire the proficient managers desperately needed to ensure prudent management of this multi-billion dollar trust. The goal here is simple: stop playing politics with our money and our people.

Our litigation has exposed an ugly story about arrogance and ineptness. But, with the help of this Committee, we can begin to write a new chapter. I appreciate this chance to testify and I would be happy to answer any questions.

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